

STRESS CLAIMS PROTOCOL

A Guide for UNISON Branches & Regions

Managing members expectations

Stress at work is increasingly a problem for UNISON members. Members suffering the effects of stress at work are in a vulnerable situation and need to be supported with care and tact. UNISON has been at the forefront in taking civil cases for damages for stress at work. UNISON took the first ever successful personal injury stress case *Walker v Northumberland County Council* (1995) as well as other major landmark cases in this field. Often, however, pursuing a claim through the courts will not achieve the best outcome for the member and many such claims can be better resolved through industrial means.

Experience tells us that the vast majority of members seeking to pursue a claim for compensation through the union's solicitors are ultimately told that their cases cannot be pursued because they are unlikely to be successful. We have impressed upon the union's solicitors the importance of ensuring that such cases are handled in a sensitive manner, bearing in mind the particular circumstances that result in them being asked to deal with these cases. At the same time, it is important to ensure that the union and its officers deal with such cases in a similar way. It is vital that we pursue cases we can win in the civil courts as vigorously as we can; but it is not fair to raise the expectations of members who are unlikely to be able to pursue a successful civil claim.

Members often perceive that they have a far stronger case than, in fact, they do have in law. Reasons for this vary. Often it is because of the very genuine sense of grievance they have for what has happened to them. Unfortunately, they have often been given unrealistic expectations, either by the union or from press reports, of what can be achieved through claims for damages for stress related injury.

A leaflet 'Stress at work – a fact sheet for UNISON members' (appendix 1) is available to assist. This outlines the issues for members.

Legal background

Following the *Walker* case, the Court of Appeal reviewed four County Court judgments in the case of *Hatton v Sutherland* (2002). The Judgment contained 16 "practical propositions" which had to be satisfied in order to succeed with a stress claim. This judgment makes it very difficult for claimants to obtain compensation through the courts. This approach to stress cases was approved by the House of Lords in the case of *Barber v Somerset County Council* (2004). Since that time only a small number of cases have succeeded in the courts.

The most difficult problem to overcome is the "Threshold Test", namely that the psychiatric injury or illness was caused by a breach of duty on the part of the employer and was reasonably foreseeable to the employer. If the claimant has not

clearly advised their employer that he/she was likely to suffer a psychiatric injury as a result of their work it is unlikely that the case will succeed. The large majority of successful cases have involved claimants who have already had one absence from work due to stress and which the employer knew was due to stress. That first absence clearly puts the employers on notice of the work related problem, and that the claimant is likely to suffer a similar problem once again if steps are not taken to improve the employee's working conditions. Reports of overwork are not necessarily enough – there must be clear evidence to the employer that the member is at risk of suffering a psychiatric illness.

If the employer is on notice, they are not necessarily required to change the work situation to meet all of the member's requirements, only to take reasonable steps to avoid injury. It will be important to distinguish between working conditions which are hazardous to the member's mental health and issues of dissatisfaction.

It is important to remember that strict time limits apply in these cases. The limitation period (ie the time within which Court proceedings must begin) is usually three years from the date on which the claimant first believed he/she was suffering from a stress related condition due to their employment.

Breach of contract

In *Gogay v Hertfordshire CC (2000)* damages were awarded to the employee, a care worker, for breach of contract. She was accused of sexual abuse and was immediately suspended from duty pending investigation. Although the employer was obliged to make enquiries the Court considered whether or not there was reasonable and proper cause to suspend the employee whilst those enquiries were being made.

The Court found that there had been a 'knee jerk' reaction on the part of the employer and a breach of the implied contractual term of trust and confidence. The employer had not carried out basic preliminary enquiries prior to taking the decision to suspend. The Court went on to say that this reaction might cause psychiatric illness to the employee and awarded damages.

However, this does not mean that all suspensions will amount to a breach of contract and most will not. If there are reasonable grounds to suspend an employee, this will not amount to a breach of contract (even if the allegations are not ultimately upheld).

Furthermore, in the more recent case of *Yapp v Foreign and Commonwealth Office (2014)* the Court of Appeal stated that psychiatric illness would not usually be a foreseeable consequence of suspension, even if the process was unfair. Employees will still need to prove that their illness was foreseeable to the employer for the case to succeed.

Claims under the Protection from Harassment Act 2007

In July 2006 the House of Lords gave Judgment in the case of *Majrowski v Guys & St Thomas's Hospital Trust*. This confirmed that an employer could be legally responsible for acts of harassment/bullying committed by a fellow employee and that a claimant who had been the victim of bullying/harassment at work could make a claim pursuant to the Protection from Harassment Act 1997.

In England, Wales and Northern

Ireland, the limitation period under this Act is 6 years from the date on which the first act of bullying occurred. In Scotland the limitation period is 3 years from the first act of bullying.

In addition a claim can be made under this Act where anxiety/distress has been suffered – there is no need to have suffered a recognisable psychiatric illness.

However it is clear, particularly from more recent cases, that these claims will not be easy to pursue either. The Court has stressed that the harassment must be of a very serious nature (either of a criminal nature or regarded as unacceptable or oppressive) and be such that a reasonable person would view it as harassment. It must have occurred on more than one occasion, be specifically targeted at the claimant and the perpetrator must also know that his/her actions will cause the person distress.

Common complaints of harassment can include clashes of personality, disagreements between employees, restructuring or operational decisions and reasonable criticism of performance or disciplinary procedures. However, disputes of this nature will not generally be regarded as harassment.

As a result claims under this Act will only be possible where serious acts of bullying/harassment have taken place.

Procedure in personal injury stress cases

In view of the above, stress cases will be dealt with in the following way to ensure an effective system is operated to meet the needs of our members.

1. First contact

It is important that any member who seeks legal assistance regarding an issue at work which is causing them stress receives prompt advice on employment law issues which will be dealt with internally by UNISON.

If, after considering employment solutions, advice is required in relation to a personal injury claim, the branch or full time officer responsible for the

branch should provide the member with the brochure 'Stress at work – a fact sheet for UNISON members' (Appendix 1) and then complete the 'Stress Checklist' with the member (Appendix 2).

Evidence of a successful grievance can be very useful in pursuing a civil stress claim or a claim for bullying/harassment. Consequently, and only where the grievance is to be concluded very shortly and no time limits would be missed, it may be sensible for a member to conclude this internal procedure before assessing whether adequate evidence exists to pursue a civil claim.

The Checklist sets out the requirements which must be met to decide whether or not advice can be requested from the union's solicitors under UNISON's Stress Protocol.

If the member's case does not satisfy the criteria, the branch should write to the member with general advice on potential remedies with focus on the main employment law issues. It is important to remember the time limits: three months for the employment tribunal.

Appendix 3 gives some suggested text for the letter. The letter will explain why advice cannot be sought from union's solicitors about a personal injury claim and confirm the time limits for a personal injury claim.

The letter also deals with lodging a grievance and goes on to pursuing a claim through a tribunal. It should give simple general advice on the difficulties of pursuing such a claim, the time limits and indicate that if a member wishes to pursue the matter further they should contact their branch secretary.

Some general resources, case studies and frequently asked questions will be available online or hard copies of this document can be ordered, stock number 1926, to assist branches and regions.

If a member is dissatisfied with the letter confirming that advice cannot be sought from the union's solicitors about a personal injury claim or the member has evidence which clearly

indicates that there are issues to investigate even though the facts do not in themselves meet the checklist criteria the branch may refer the matter to their regional organiser, who may seek a telephone discussion with the union's solicitors if appropriate. In those cases, regions should contact our appointed solicitors on 01142743600 or 01142743635 if further assistance is required before reviewing/confirming advice to the member. This helpline is intended for exceptional cases only. Finally there are rare occasions where a member is suffering from stress at work but this case should not be dealt with through this protocol. These exceptions cover Data Protection Act claims where the stress has been caused by one of more breaches of the data protection act; and cases involving post traumatic stress disorder following an accident, event or incident. Access to legal assistance for these personal injury claims should be through UNISONdirect. Please refer to the end of the Checklist (Appendix 2)."

2. Legal assistance

When a member wishes to pursue a civil claim for psychiatric injury which has been caused by their work **and** can satisfy the criteria, the branch should complete the Application for Legal Assistance and ask the member to complete the member's section. This application is headed "Stress Claim Form – Legal Assistance for branches for work related stress personal injury advice", stock number 1984. It should be remembered that this does not necessarily mean that the case can be pursued – only that advice is to be obtained from the union's solicitors as to whether or not further investigations should be made. It is important to ensure that members understand this.

When a member has been suffering from stress at work it can be hard for them to complete such forms, so the branch should assist where necessary. The branch should also ensure that all relevant information and documentation is attached to the form. This will mean that our appointed solicitors will have as full a picture as possible of the issues involved and allow them to give their advice quickly.

The completed application will help the union's solicitors in their initial investigations, and it will also let them know that the branch or a full time officer has already been involved. They will be encouraged to involve the branch or full time officer in their investigations.

At the same time, it is very important to ensure that member's expectations are not built up unnecessarily. From time to time in stress cases it is apparent that somebody within the union has encouraged the member to seek compensation as a solution to the difficulties the member is in and suggested the member has far better prospects of success than almost always turns out to be the case.

It is important to avoid building up expectations in this way, and to ensure that suitable warnings are given to members when a request for legal assistance is submitted. It is particularly important to ensure that seeking legal assistance is not seen as a means of shifting an intractable problem away from the union to our lawyers, when in reality a personal injury claim may not be successful.

Upon receipt of the completed Application for Legal Assistance, the union's solicitors will be instructed. The union's solicitors will review all the papers and give written advice directly to the branch on the prospects of a successful claim from the information provided. This will be copied to UNISON Legal Services. It is crucial that this advice is promptly passed on to the member by the branch as, if the member remains unaware of the advice and time limits are missed, UNISON could potentially be held responsible. Equally, if the solicitors contact the branch for more information it is important to reply quickly so that the matter can progress.

Our solicitors should adhere to UNISON's Standards of Service Quality for stress cases. Any concerns about the quality of service our branches receive from our lawyers should be raised with UNISON Legal Services.

On receipt of the written advice, UNISON Legal Services will then

decide whether to continue legal assistance for further investigations to be carried out, based on the advice received from the union's solicitors after their consideration of the evidence. Further legal assistance will be given where we are advised by our solicitors that the case has reasonable prospects of success.

It is hoped that this way of dealing with stress cases will enable UNISON to give members proper and early advice of all possible remedies available. In addition, it will ensure that industrial relations solutions are pursued wherever appropriate rather than resorting immediately to a personal injury case. This way of working will enable UNISON to focus resources on the few personal injury claims which should be pursued. It will help to avoid the position where members are referred to solicitors without being given the opportunity to pursue other valid and effective means of addressing and resolving the problems which have arisen at work.

Stress and Employment Tribunal claims

It is very important to be aware of the position where a member complains of work related stress arising from an act of discrimination. A tribunal claim can be brought for discrimination because of age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race and sex or sexual orientation. In these cases a claim for personal injury will generally be considered as part of any tribunal claim for discrimination.

In the case of *Sheriff –v- Klyne Tugs (1999)*, an employee brought a claim for race discrimination in the employment tribunal. He suffered a nervous breakdown and was signed off work with anxiety and stress. Although he settled his employment tribunal claim, he then brought a separate claim for personal injury in the County Court. The Court held that, as his personal injury was caused by discrimination, compensation for those injuries should have been sought in an employment tribunal as part of his race discrimination claim. The Court refused to consider his personal injury

claim on the grounds that it was an abuse of process to try and bring a claim in a separate Court when the injury arose out of the same facts as the discrimination claim.

This means that a member who suffers unlawful discrimination MUST ensure that any personal injury claim forms part of any employment tribunal claim otherwise they could lose the right to recover compensation for the personal injury.

It is crucial to establish at the outset what the member says is the cause of their stress. Try to

find out more – does the member say that they have been treated unfairly because of age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race and sex or sexual orientation.

If the member claims that their stress is for one of these reasons, complete an employment law case form for the member and refer it to the regional organiser for employment law advice as soon as possible and consider whether or not an application for early conciliation via ACAS should be submitted. It is important that these

cases are identified at an early stage so that the appropriate advice can be given to protect the member's interests.

Remember:

- There are different legal tests which apply to claims for discrimination compared with claims for personal injury (see box 1).
- There are strict time limitations that apply to employment tribunal and personal injury claims (see box 2)

Box 1: Discrimination –

the member has to show they have been discriminated because of their age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race and sex or sexual orientation.

Discrimination can be direct, indirect, harassment and/or victimisation.

Personal injury – the member has to show that the employer not only caused the personal injury but that the personal injury was reasonably foreseeable and the employer did not take reasonable steps to avoid injury.

Under the Protection from Harassment Act, the injury does not need to be foreseeable but the member must prove that they suffered a course of conduct which was extremely serious, targeted at them and designed to cause distress.

Box 2: Employment Tribunal –

generally a claim must be lodged within 3 months less one day of the act or (where there is a series of acts) the last act complained of. The time limit can be extended in limited circumstances.

Personal injury - three years from the date of knowledge of the injury. Six years if the case is based upon the Protection from Harassment Act 1997 in England, Wales and Northern Ireland – 3 years in Scotland.



Appendix 1: STRESS AT WORK – A FACT SHEET FOR UNISON MEMBERS

Stress at work is a major problem in the workplace. It causes long-term incapacity to thousands of workers. Millions of working days are lost every year.

If you believe that you are suffering from stress at work, there are things you can do to try and deal with the problem.

1. Prevention

The best advice is to tackle the problem before it causes real harm. Speak to your UNISON representative who can raise it with your managers. Ask your union representative to check if your employer has carried out a risk assessment and, if not, to ask that they do so. Your union can also check if your employer has a policy for dealing with occupational stress and raise Health & Safety Executive standards with them. If you need further training to do your job or counselling to help you cope with the pressures of your job, speak to your union representative who can help you to liaise with your employer about this.

UNISON is working to ensure that pressure is kept on employers to reduce stress in the workplace and, where appropriate, to provide assistance and counselling.

2. Employment resolutions

Internal Grievance

If it is not possible to resolve the problem by informal means, discuss with your UNISON representative whether or not you can lodge a grievance, to raise the issue more formally and require your employer to carry out a full investigation. Your UNISON representative can assist you with preparing and presenting your grievance.

Employment Tribunals

In some circumstances, occupational stress may be caused as a result of failure by your employers to deal with you fairly at work. It may be that your employer has discriminated against you for a reason which may be a 'protected characteristic' – because of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation. In limited cases it is possible to prove that the way you have been treated amounts to a breach of your contract of employment or, in very limited circumstances leading to resignation, you may be able to claim that you have been unfairly dismissed on the grounds of constructive dismissal. Proving constructive dismissal is very difficult and successful cases are rare. You should not take any action to resign from your job without discussing this with your UNISON representative.

If you believe that any of these circumstances apply to you, you should contact your UNISON representative straightaway. They can advise whether or not you have any reasonable prospects of success in pursuing a claim in the Employment Tribunal. There are very short time limits for bringing a claim to the Employment Tribunal – a claim must normally be registered within three months of either the act of discrimination or the 'effective date' of termination of employment.

3. Legal action for personal injury

i. Common Law claims

If you are unable to resolve the issues internally and you suffer from psychiatric illness as a result, you may

require advice about a personal injury claim.

The legal hurdles in these cases are very difficult to overcome. Only a very small proportion of these cases succeed. Pursuing a case through Court proceedings is extremely stressful and can cause you further anxiety. Legal action should always be a last resort. It does not make you better and action can only start once the damage has been done.

In order to consider obtaining legal advice about a personal injury case, you must be able to fulfil all of the below:

1. You must have a diagnosed, classified psychiatric illness. It is not enough to have suffered from 'stress'. A diagnosis of psychiatric illness is essential.
2. Your psychiatric illness must be caused by work and by a breach of duty on the part of your employer. If you have suffered stress which is mainly due to personal circumstances outside of work, it is unlikely that you can obtain compensation from your employer.
3. You must prove that your psychiatric illness could be clearly foreseen by your employer – ie, did they know (or should they have been aware) that your mental health was at risk due to the work issues?
4. This is extremely difficult to prove. Unless you have been absent from work before with occupational stress a Court is unlikely to find your illness foreseeable to them, and unless you can show that your employer knew or should have known that you were at risk of suffering a psychiatric injury, it will not be possible to pursue a case.
5. It is not usually enough to report

increasing work demands, 'stress' or dissatisfaction with the work. There must be clear evidence that the work situation is impacting on your health.

6. You must be able to show that your employer did not take reasonable steps to address the issue once they were aware of the potential illness. The employer is not obliged to make any or all of the changes that you suggest, unless clear failure to do so is likely to cause you an injury. A court will not interfere with, for example, business decisions or restructuring, general increases in work unless there is a clear risk to your health.

If you cannot prove all of the above it is unlikely that you can pursue a personal injury case at common law.

If you believe that your case fulfils all of the above, you should discuss this further with your UNISON branch to see whether or not legal advice can be obtained from the union's solicitors.

Time limits

Court proceedings must be commenced within three years of the injury. The time limit will usually run from the date that you knew or should have known that you were suffering with a stress related condition due to your work.

ii. Claims for Bullying and Harassment

If you have been the victim of bullying or harassment at work, you may be able to make a claim under the Protection from Harassment Act 1997.

To bring a claim under this Act, you must be able to prove all of the following:

1. The behaviour you suffered was extremely serious – enough to amount to criminal behaviour or be oppressive and unreasonable. Clashes of personality, workplace disputes between colleagues and reasonable criticism of performance or disciplinary procedures, for example, will not generally be regarded as sufficiently serious.

2. It must have occurred on more than one occasion.
3. It must have been specifically targeted at you.
4. The perpetrator must know that his/her actions will be sufficiently serious to cause you distress.
5. The action must also be conduct that a reasonable person would think amounted to harassment of you.

It is not necessary to prove that you have suffered a recognised psychiatric injury in order to make a successful claim for compensation for harassment.

Time Limits

The time limit for claims under the Act is 6 years from the date on which the first act of bullying occurred or 3 years if the case is pursued in Scotland.

4. What should I do if I am suffering stress at work?

A court action will not give you back your health and it will not restore you to a job in a manageable environment. It may, in a very limited number of cases, provide some compensation. However, the majority of people affected by stress at work will not be helped by the courts. UNISON is there to help you whenever it can. If you have been unable to resolve the work issues by way of informal or formal employment means and you believe that you can satisfy all of the above points for bringing a personal injury claim, please contact your UNISON representative to see what further steps can be taken. You should bear in mind the strict time limits set out above and do not delay if you wish to seek advice.



Appendix 2: CHECKLIST FOR BRANCHES

Please complete this checklist to decide whether or not legal advice can be requested from UNISON's solicitors. You should only complete the UNISON stress protocol questionnaire (headed Stress Claim Form, stock number 1984) to request legal advice if the criteria under section (1) or (2) are met, and you must attach this completed checklist to that questionnaire.

It is important for the member to understand that requesting legal advice does not guarantee that they will be able to pursue a case. Equally, it is crucial for the member to understand that not meeting the criteria does not necessarily mean that there is no legal case to pursue but that these are the criteria for access to legal advice.

There are rare exceptions, involving post traumatic stress disorder and data protection act breaches where cases should not be dealt with under this protocol – please refer to the end of this checklist.

1. Personal injury claim at common law

Time Limits: Court proceedings must be started within three years of an injury. The time starts when the member knew or should have realised that they were suffering with an illness that might be related to work.

Please tick or circle

1	Has the member had stress related psychological symptoms in the last 3 years?	Yes	Move to Q2
		No	Criteria not met – no referral to solicitor
2	Has the member been absent from work on more than one occasion due to stress AND told the employer that the reason for those absences was stress?	Yes	Complete stress protocol questionnaire for legal advice
		No	Criteria not met – no referral to solicitor

2. Bullying and harassment cases under the Protection from Harassment Act 1997 (please also note exceptions at the end)

Time limits: Court proceedings must be started within 6 years of the date that the bullying or harassment began, or 3 years in Scotland.

1	Has the member been bullied or harassed in the last 6 years (3 years if in Scotland)?	Yes	Move to Q2
		No	Criteria not met – no referral to solicitor
2	Are the member's psychological problems related to their involvement in: Disciplinary proceedings against them? Criticism of performance or capability procedures? Restructuring/ changes to place or pattern of work? Clashes of personality with colleagues or arguments at work	Yes	Criteria not met – no referral to solicitor
		No	Complete stress protocol questionnaire for legal advice

Exceptions for harassment cases: if the bullying/harassment is related to a relevant protected characteristic (age, disability, gender reassignment, race, religion or belief, sex, sexual orientation) or if it involves physical violence, legal advice should be obtained under the stress protocol. You should complete a UNISON stress protocol questionnaire with the member. In these circumstances, you should also consider whether or not there is any potential case in the Employment Tribunal and remember there are much shorter time limits for this.

If a member raises allegations of discriminatory treatment which is related to either pregnancy/maternity or marriage/civil partnership, legal advice should be obtained under the stress protocol. You should complete a UNISON stress protocol questionnaire with the member. In these circumstances you should also consider whether or not there is any potential case in the Employment Tribunal and remember there are much shorter time limits for this.

Post Traumatic Stress Disorder (PTSD) –

If the matter raised relates to the development of PTSD as a result of an accident, event or incident within the last 3 years this should not be dealt with under the Stress Claims Protocol. To access legal services about this personal injury claim the member should contact UNISONdirect on 0800 0 857 857.

Data Protection Act (DPA) Claims –

If the matters raised are in relation to one or more breaches of the DPA (rather than issues of work related stress/harassment or bullying) and occurred in the last 6 years this should not be dealt with under the Stress Claims Protocol. To access legal services about this personal injury claim the member should contact UNISONdirect on 0800 0 857 857.

Appendix 3: SUGGESTED LETTER FROM UNISON BRANCH/REGION

Dear (member)

I am writing to confirm the options available to you following your request for advice about the possibility of bringing a personal injury claim for stress at work.

We discussed the requirements to bring a claim for personal injury and I have provided you with UNISON's fact sheet which sets out the legal hurdles. Such cases are very difficult to pursue and very few are successful. After consideration of your situation with you, I cannot refer a potential case for you to UNISON's solicitors under the Stress Protocol as it does not meet UNISON's criteria for access to legal advice.

If you still want to obtain legal advice, you can seek independent legal advice on a private basis. UNISON cannot pay for this. If you wish to do this, you should contact a solicitor as soon as possible in light of the time limit which applies to your case.

The time limit for bringing a personal injury claim is outlined in the fact sheet but I would like to remind you about this. Court proceedings must be started within three years of the date that you knew or ought to have known that you were suffering from a psychiatric illness caused by your work. In cases of bullying and harassment where you may be able to bring a claim under the Protection from Harassment Act, the time limit is six years from the date of the first act of harassment which took place or three years from the date of the first act of harassment in Scotland.

There are steps which you may wish to consider in order to help resolve your problems at work. If you have not already done so, you should notify your employer immediately about your concerns. You can ask for a stress risk assessment to be carried out and a meeting to discuss your concerns. If no satisfactory response is obtained following this, you should consider putting forward a grievance. *(insert name of unison representative)* can assist you with this procedure. If you want to pursue this course of action or you are already involved in a formal grievance and you want advice, please contact *(insert name of appropriate person and contact details)* for assistance.

Some members may be able to pursue their case further through the employment tribunal. The time limit for filing your case with the tribunal is only three months less one day from the date of the act complained of, even if your grievance has not been dealt with by then. If a case is to be pursued in the tribunal, you must also notify ACAS in order that consideration can be given to using the ACAS early conciliation service. If you think that you might have a claim you must tell me immediately as the time limit is strictly applied.

Please contact *(insert name of appropriate person and contact details)* if you require further assistance.

Yours sincerely

Branch/region



